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No. 88-494
(Consolidated with No. 88-429)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WASHINGTON LEGAL FOUNDATION,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT WASHINGTON LEGAL FOUNDATION

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REPLY BRIEF FOR APPELLANT WASHINGTON LEGAL FOUNDATION

INTRODUCTION

Appellant Public Citizen's Reply Brief presents arguments with which appellant Washington Legal Foundation essentially agrees. Consequently, in the interests of judicial economy, appellant will not repeat all of those arguments in its reply, although to some extent there will necessarily be an overlap of views.

With respect to the issue of standing, we of course agree with the Department of Justice that we have standing under the Federal Advisory Committee Act, 5 U.S.C. App. II, (FACA) to raise the issue of the denial of access to records and meetings of the ABA Committee. DOJ Br. at 14. While we believe that we have standing to raise other claims under FACA as well, it is unnecessary to resolve that issue because, as Public Citizen correctly points out, "a finding that appellants have rights under any provision of the Act requires resolution of the threshold question of whether the Department's use of the ABA Committee is subject to the Act at all...." PC Reply Br. at 5.[1]

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[1]DOJ suggests that we would have standing to challenge DOJ's failure to comply with other provisions of FACA in addition to the denial of documents and access to meetings if we alleged that "any member of [our] organization[ ] would have been nominated for the federal bench had the ABA Committee not been rendering confidential advice to the President." DOJ Br. at 15. While the facts show that the ABA renders advice only to the Assistant or Deputy Assistant Attorney General of the Office of Legal Policy rather than to the President, *see* Matthews Decl. ¶¶ 7-10 (J.A. 21-22); 28 C.F.R. 0.23(d), we are nevertheless prepared to make such allegation in an amended complaint if necessary since at least two members of appellant's advisory board, Professors William F. Harvey of Indiana University School of Law and Professor Lino Graglia of the University of Texas Law School, were adversely considered by the ABA Committee for circuit court judgeships. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). If need be, unsuccessful candidates can also be named as individual plaintiffs.

The ABA argues that since appellants recognize that FACA's exemptions from disclosure might be applicable with respect to certain documents or meetings, we lack standing because the redressability prong of standing is allegedly unsatisfied. ABA Br. at 15-16. The ABA is obviously confusing the concept of redressability with the relief a litigant may or may not obtain after litigation on the merits. In any event, there are certainly some documents (or segregable portions thereof) or meetings held by the ABA Committee which would not interfere with appellees' claim for confidentiality in individual cases, such as meetings with the Attorney General to discuss general matters about ABA Committee procedures and the proper evaluative criteria to be used.[2]

Accordingly, this case is in a proper posture for its adjudication on the merits. Appellant will focus on the two main issues presented in this case, *i.e.*, the statutory coverage of FACA and the separation of powers.[3]

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[2]*See, e.g. Wall Street Journal*, Feb. 6, 1989 (Attorney General's meeting with ABA Committee to discuss its role and to express concerns about improper investigative conduct).

[3]As for the ABA's First Amendment argument, we agree with DOJ that the ABA has no First Amendment right "to engage in a confidential relationship with the government." DOJ Br. at 46, n. 52. Resolution of this issue is more appropriate in the district court since that court has not had an opportunity to pass on the issue. For an excellent article concluding that the ABA Committee is covered by FACA, and that neither the separation of powers nor the ABA's First Amendment rights would be violated, see Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 Colum. L. Rev. 550(1989). Page proof copies of the Note have been lodged with the Clerk's Office and served on all parties and *amici* with this reply brief. Published copies will be available later this month.

I. THE ABA COMMITTEE IS AN ADVISORY COMMITTEE UNDER FACA.

As a preliminary matter, appellant believes that a proper understanding of this case requires a clear presentation of the facts. However, briefs by the Department of Justice and the ABA contain a number of ambiguous, misleading, and inconsistent statements from the very beginning.[4] One of the more curious statements in DOJ's brief is the following:

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[4]For example, in the second sentence of its brief, DOJ states: "In deciding on [judicial] nominations, the President relies on advice from a federal judicial selection committee composed of several officials at the White House and the Department of Justice." DOJ Br. at 2. However, the record evidence, to the extent that there is any in this case, supports the more accurate assertion in our opening brief that this "committee does not, as a committee, advise the President of anything, but only pre-selects potential candidates for *DOJ's* investigation and consideration." WLF Br. at 6, n.3 (emphasis added); *see* Matthews Decl. ¶ 7 (J.A. 21). DOJ also asserts that "Presidents have often decided not to nominate a person who received an unqualified rating from the ABA Committee...." DOJ Brief at 4. Again, the record shows that the President does *not* make any such decision. Rather, the Attorney General is the individual who decides whether to recommend to the President a person who receives an initial unqualified rating from the ABA. *See* Matthews Decl. ¶ 11 (J.A. 22); Def. Statement of Material Facts, ¶ 7 (J.A. 35). Consequently, contrary to what DOJ implies, the President is not likely to be aware of the negatively rated candidate, and hence, makes no affirmative "decision" not to nominate that person.

As demonstrated in our brief, this category of ABA-"vetoed" candidates is significant since there is no opportunity for public scrutiny via Senate confirmation hearings of that aspect of decision-making process. Appellees' separation-of-powers argument is also weakened since, under these circumstances, no advice or recommendation from the ABA ever reaches the President. If a final rating is given to a candidate, the ABA unequivocally states that it discloses to DOJ "*only* the rating.... Neither the contents of the Circuit member's report nor the contents of any of any of the interviews or other background information are disclosed." ABA Br. at 4 (emphasis added). Yet DOJ admits, that the "reasons for the final rating are sometimes revealed" to DOJ, which logically would include information from the ABA committee reports. DOJ Br. at 4. These and othe inaccuracies underscore appellant's argument in its opening brief, WLF Br. at 44-45, that if there is any doubt about FACA's applicability in this case, it would be more appropriate to remand for further fact-finding rather than to rely on secondary sources and self-serving statements as a basis for striking down an Act of Congress as unconstitutional.

> Since 1974, the Attorney General has formally taken the position that the ABA Committee is not governed by the FACA. Accordingly, neither the Department of Justice nor the ABA has followed the Act's requirements in connection with the process of advising the President on potential nominees for the federal branch [sic].

DOJ Br. at 7. In the first place, it is not clear what DOJ means by its claim that the Attorney General "has formally taken the position" that the ABA is not covered by FACA. Nor is it clear in what manner this position has been "formally taken" by all the subsequent Attorneys General since 1974.

The mystery seems to have been cleared up on March 28, 1989, when DOJ lodged with this Court a remarkable and revealing set of DOJ memoranda and letters to the ABA from 1973-74. Those documents make it abundantly clear that the Attorney General and other officers of the Justice Department had throughout 1973 and most of 1974 "formally" concluded just the opposite, namely that FACA did indeed apply to the ABA Committee's advisory role with DOJ, and that the application of FACA to the ABA would not unduly interfere with the screening process. It was only after the ABA threatened to discontinue providing advice to DOJ if it were required to comply with any aspect of the law that DOJ "backtracked from [its] former position" and concluded that FACA does not apply to the ABA because of a perceived problem with separation of powers. *See* Memorandum from Assistant Attorney General Scalia to the Attorney General (October 7, 1974); Letter from Attorney General William Saxbe to William Reece Smith, Jr., Chairman of the ABA Committee (October 9, 1974).

The first "formal" position of the Attorney General on the matter was succinctly expressed in a letter dated February 25, 1974, from Attorney General Saxbe to the Chairman of the ABA Committee. That letter states in relevant part:

> In my opinion, as a matter of statutory construction, the position set forth in the May 23, 1973 memorandum of the Office of Legal Counsel is correct. That is, the Committee is subject to the Act to the extent that the Committee is engaged in the function of providing judicial qualification ratings to the Department of Justice. A memorandum summarizing our reasons and our response to the memoranda of [the ABA's] Mr. Klitgaard and Mr. Walmsley is enclosed.
>
> A charter complying with subsection 9(c) of the Act must be prepared for the Committee, but generally speaking coverage by the Act should have little practical effect upon the Committee. We will defer preparation of the charter until you have responded to this letter, but we request that you respond at your early convenience. If as a policy matter the Committee does not wish to accept coverage by the Act, we suggest that you seek an appropriate amendment to the statute. In the meanwhile, we will be happy to cooperate with you in achieving compliance with the Act.[5]

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[5]Despite the fact that in early 1974, the formal position of the Attorney General was that the ABA Committee is covered by FACA, and despite the obvious controversy that surrounded the matter in 1973-74, the ABA Committee informed counsel for appellant that "It has been generally recognized *since 1972* that our Committee is not covered by the provisions of the Federal Advisory Committee Act." *See* Letter from Robert B. Fiske, Jr., Chairman of the ABA Committee to Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation (November 27, 1985) (emphasis added) (J.A. 19).

This letter and the three memoranda attached to it remarkably track the very same arguments appellants have advanced in the court below and in this Court.[6] They show that DOJ itself recognized that the plain meaning of the word "utilized" encompasses the ABA Committee, that application of FACA to the committee would not unduly disrupt its activities since most of its business is done via telephone and mail which is exempt from FACA coverage, and that exemptions (such as 5 U.S.C. 552(b)(6) dealing with personal privacy) could be invoked to keep meetings closed.

* * *

The lower court held, as appellants have argued, that the plain meaning of the word "utilized" clearly encompasses the relationship between DOJ and ABA. In response, DOJ attacks the "plain meaning" rule, claiming that it is merely "an axiom of experience than a rule of law" (quoting Justice Holmes in *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928). DOJ Br. at 21-22. Applying the commonsense dictionary definition of the word "utilized" would, according to DOJ, give FACA "an astonishing reach" not intended by Congress. DOJ Br. at 20. But DOJ would have this Court ignore the plain meaning of the word "utilized," the GSA regulations that interpret and reasonably limit the reach of FACA, and the logical notion that the ABA Committee is an advisory committee, and instead give "utilized" an astonishingly restrictive meaning. DOJ urges this Court to carve out of the statute an arbitrary exemption for all advisory committees that do not receive federal funds, and that advise the President -- and presumably any government

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[6]Summary Statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel; Memorandum from Mr. Dixon to Edmund W. Kitch, Special Assistant to the Solicitor General (Dec. 7, 1973); and OLC Memorandum (May 23, 1973).

employee -- on the exercise of any exclusive Presidential power, such as appointments, pardon, veto, and the like.

The ABA and its supporting *amici* take the additional position that the word "utilized" should apply only to those committees "established by or for the federal government." ABA Br. at 22; People For the American Way Br. at 13. And since the ABA Committee was established in 1946 but not utilized by the Executive until 1952, it was not "established...for the federal government" in 1952 and hence, is not covered by FACA. Both of these statutory arguments are meritless.

A. With respect to the ABA's statutory argument, it is remarkable that it makes its judicial debut in this Court.[7] While it is certainly free to raise this argument on appeal, the ABA, which unsuccessfully made this argument to DOJ in 1973, apparently did not think enough of it to raise it in the district court. This Court should not think much of it either.

While it is true, as the ABA points out, that the word "utilized" was added in the Conference Report on FACA, the ABA's attempt to ignore the plain meaning of the word and limit that phrase to committees "directly established by or for the federal government" is not endorsed by the DOJ, the very agency which is charged under FACA with applying its terms to its own advisory committees. Indeed, it was expressly and persuasively rejected by DOJ in 1973-74:

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[7] In *Washington Legal Foundation v. ABA Standing Comm., On Federal Judiciary, 648 F. Supp. 1353 (D.D.C. 1986) (WLF I)*, the ABA filed a lengthy motion to dismiss WLF's complaint, but gave no hint or suggestion of this statutory argument. *See ABA Motion to Dismiss* (filed Feb. 21, 1986). Rather, the ABA only argued that it was not an advisory committee under FACA and GSA regulations because the ABA Committee 1) deals with "personnel rather than policy matters," 2) "is not a preferred source of advice", and 3) "does not provide advice or recommendations." *Id.* at 34-41.

> Our Office has prepared a previous memorandum examining the legislative history and meaning of the term "utilized" and its treatment in the OMB-Justice Guidelines. That memorandum includes a list of significant factors to be considered in determining whether a committee is being utilized for advice by an agency. Included are the following: the purpose for which the committee was created, the initiative for dealings between the committee and the federal agency, the purpose of the federal officials in dealing with the committee, and the nature and frequency of the dealings. Applying these standards to the ABA Committee, it is clear that it is utilized by the Department within the meaning of the Act.[8]

The OLC memorandum to the Solicitor General's Office (December 7, 1973) further demonstrates the flaws in the ABA's argument that the pedigree of its committee is determinative of FACA's coverage:

> A major purpose of the Act is disclosure of the identity and operation of committees intimately involved in advising the Government, and the Act applies both to committees established by an agency and to committees utilized by an agency. Hence, the relevant inquiry concerns the operation of a committee, *not just the circumstances of its birth.* As explicitly stated in the revised guidelines, the initial reason for a group's establishment is just one factor to be considered in determining the scope of the "utilization" concept.

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[8]OLC Memorandum 4-5 (May 23, 1973). The standards referred to in the OMB-Justice Guidelines are similar to those promulgated by the GSA. 41 C.F.R. Subpart 101-6.10.

Id. at 3 (emphasis added).[9] But even if one were to accept the ABA's crabbed interpretation of "utilize" to encompass only those advisory committees "directly established by or for" a government agency, the ABA Committee would nevertheless satisfy that test. FACA defines an "advisory committee" as any "committee... panel, task force, or other similar group, or any subcommittee or other subgroup thereof...which is...established or utilized by one or more agencies...." FACA, §3(2)(C). Thus, while the full ABA Committee may technically have been established in 1946 to advise the Senate, as opposed to the Executive, which began utilizing it in 1952, the facts show that every time the Justice Department considers a candidate for a judicial post, the candidate's name is not provided to the ABA Committee as a whole, but only to the relevant ABA Circuit member and the ABA Committee chairman. ABA Br. at 3. This committee of two is indisputably a subcommittee or subgroup that advises the Department of Justice during the crucial preliminary rating stage of the evaluation process *before* the rest of the ABA

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[9]The memorandum goes on to note correctly that Executive Order 11,007 (1962) and 11,671 (1972), the predecessors to FACA, expressly excluded advisory groups composed wholly of "charitable, religious, educational, civil, social welfare, or other similar nonprofit organizations." Congress was obviously aware of this broad exclusion when it considered adopting FACA, but did not continue that exclusion in enacting FACA. If the Court were to adopt the ABA's and PAW's argument that coverage under FACA is determined by whether the private committee was first established for the executive branch, then FACA would not apply to any industry or trade group or committee that was initially "established" one day to advise Congress or a state government about a particular policy or issue, and then "utilized" the next day (or week or year), on a consistent basis by the executive branch of the federal government for advice on the same or similar policy. The language and purposes of FACA simply do not support such a gaping loophole in the statute that the ABA and PAW would have this Court create.

Committee gets involved in the process, if it ever does. *See* ABA Br. at 3-4.[10]

These "subcommittees" were certainly not established in 1946, but were established for and are utilized by DOJ each and every time a candidate's name is considered by DOJ. Accordingly, the word "utilized" would encompass the work of the ABA Committee even under the ABA's artificially narrow definition of it. *See National Anti-Hunger Coalition v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 771 F.2d 1071, 1075-76 (D.C. Cir. 1983)("task forces" of committee which reports "directly to federal decision makers" may very well lead a court "to conclude that the task forces themselves [are] subject to the requirements of the FACA").

B. The DOJ's statutory argument is as meritless as the ABA's. DOJ ignores the plain meaning of the word "utilized" and argues that its meaning should instead be understood solely with reference to two factors arbitrarily chosen by DOJ from the many factors which may have motivated some members of Congress to vote for FACA: 1) whether the advisory committee receives federal funds, and 2) whether the committee is exerting undue influence on an agency that may affect the interests of the committee. DOJ Br. at 23, 27. DOJ attempts to justify its departure from the plain meaning

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[10]Depending upon the particular case, this pre-screening subcommittee may consist of more than two members. As recounted by Edward C. Schmults, former Deputy Attorney General during the stormy confirmation hearings for J. Harvie Wilkinson:

> At another meeting, again on a Saturday morning, I met . . . with four members of the ABA committee and they outlined their concerns about a candidate the Department was considering. I agreed with them that their concerns were disqualifying and stated at the meeting that the administration would not proceed with the candidate. Another candidate was selected.

Confirmation Hearings on Federal Appointments. Hearing before the Senate Judiciary Committee, Part 3, 98th Cong., 2d Sess. 274 (1984)(hereinafter *Confirmation Hearings*).

of the statute because the plain meaning "'yields results so manifestly unreasonable that they could not fairly be attributed to [legislative] design.'" DOJ Br. at 21 (quoting *United States v. Rutherford*, 442 U.S. 544, 555 (1979). If anything is "manifestly unreasonable," it is the contrived and implausible conclusion that the ABA Committee is not "utilized" as an advisory committee by the DOJ when all of the characteristics of its advisory relationship with DOJ admit of that conclusion. Neither the DOJ nor the ABA is able to point to any "*clearly expressed* legislative intent to the *contrary*", *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (emphasis added) that might justify a departure from the plain meaning of the text of the statute. In any event, the two arbitrary criteria selected by DOJ to place a limiting construction on "utilize" are misplaced as outlined in our opening brief. WLF Br. at 21-26.

1. FACA by its own terms applies regardless of whether federal money is expended. *See also* S. Rep. No. 1098, 92d Cong. 2d Sess. 8 (1972)(FACA applies "whether or not Federal money is expended"). The goal of public disclosure explicit in the terms of FACA would be easily thwarted if advisory committees not receiving public funds, but nevertheless influencing the governmental decision-making process, were deemed exempt from FACA's coverage.

2. DOJ's second claim, that courts should limit FACA to those advisory committees that have a stake in the agency decisions they try to influence, unreasonably ignores the prophylactic purpose of the law. As more fully explained in our opening brief, the ABA is a special interest group that obviously *does* have an institutional interest in the composition of the federal judiciary. WLF Br. at 22. The ABA, as an institution, takes highly controversial positions in court, and lobbies Congress on issues that are before the courts. Furthermore, the ABA is composed of lawyers

who seek court-awarded attorney's fees and who can be disciplined by federal judges.

Surprisingly, DOJ cites in its own brief an excerpt from the Senate Report on the FACA that "[t]he lack of public scrutiny of the activities of advisory committees was found to pose the danger that *subjective influences not in the public interest* could be exerted on the Federal decisionmakers." DOJ Br. at 26 *citing* S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972)(emphasis added). This concern clearly exists with respect to ABA Committee. As noted in our opening brief, the ABA, which purports to use objective criteria in evaluating judicial candidates, has in fact resorted to investigating the political, ideological, and even religious beliefs of candidates -- hardly factors that admit of objective assessment.[11] Negative ratings that are based even in part on such factors exerts an inappropriate "subjective influence" on DOJ officials. The ABA Committee has made its influence clear when it admits that it will "oppose[] the nomination" of negatively rated candidates. ABA Br. 5 at n.3.

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[11]The ABA has not denied any of the examples cited in WLF's brief outlining the abuses and irregularities in the ABA's investigative procedures, its conflicts of interest, and its consideration of political, ideological, and religious beliefs. WLF Br. at 7-9, 14. Yet another example of the ABA's probing a candidate's religious beliefs has recently come to light. *See Legal Times*, April 3, 1989 at 1, col. 3. Arthur Schwab, a respected litigating partner in the Pittsburgh firm of Reed, Smith, Shaw & McClay, was rated "unqualified" for the federal bench after the ABA inquired into his practice of sending his children to private Christian schools. *Id.* The ABA's feathers were also apparently ruffled when it appeared to them that expressions of support for Schwab constituted "lobbying" for the judicial post. *Id.* at 12. Amazingly, the only response by the ABA to these investigatory abuses is its expression of concern that FACA may force the ABA "to change" its noxious practices. ABA Br. 12. We hope FACA does just that. At a minimum, however, since the ABA itself regards its screening procedures as "a responsibility involving the public trust," *ABA Journal*, Nov. 1986 (statement of ABA President Eugene Thomas) the public is entitled to know whether the ABA screens judicial candidates for their professional qualifications and skills, or whether such investigations include wholly improper or extraneous inquiries into the candidate's religious, political, or ideological beliefs.

The DOJ concludes its strained statutory argument by admitting that, "The interpretation of the FACA that we propose here [to exempt all advisory committees which receive no public funds and which advise the Executive on the exercise of Presidential powers unrelated to 'the implementation of congressional policy,' DOJ Br. at 28] does not purport to resolve all the difficult questions that may arise; any such effort would be premature and inappropriate." DOJ Br. at 31. Appellant submits, however, that DOJ's proffering of this interpretation is itself "premature and inappropriate" since FACA has not yet been applied to the ABA.[12]

II. APPLYING FACA TO THE ABA COMMITTEE WOULD NOT VIOLATE THE SEPARATION OF POWERS.

DOJ argues that applying FACA to the ABA Committee's advisory role with DOJ would violate the President's nomination power because, 1) private parties "might" be reluctant to express unpopular views about the candidate to the ABA Committee, 2) having a federal official attend ABA Committee meetings "might" deter committee members from expressing themselves, and 3) applying FACA "could" lead the ABA Committee to withdraw from the evaluation process altogether. DOJ Br. at 40-41. The very speculative manner in which DOJ's argument is cast only serves to highlight

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[12]DOJ's proposal to exclude from FACA's coverage only those that involve "exclusive" Presidential powers is unprincipled. The President's Article II Commander-in-Chief powers are exclusively his, as well as his power to "take care" to faithfully execute the laws. Even if one were to accept DOJ's interpretation to exclude from FACA coverage only those powers having nothing to do with the "implementation of congressional policy," placing the veto power in that category is curious. It seems clear that the exercise of the veto power has a great deal to do with the "implementation [or not] of congressional policy." DOJ's proposed interpretation simply does not hold up under analysis and would simply lead the Court into unchartered waters.

the impropriety of prematurely striking down an Act of Congress before it has had a chance to operate, especially where it appears that FACA can accommodate these imagined fears.

While DOJ recounts the views expressed by President Washington and other Framers in various diaries and letters on the necessity of confidentiality in the appointment process, DOJ Br. at 33-35, it does not appear from any of those examples that FACA would even apply to those situations, or if it did, that the exemptions in FACA could not accommodate the confidentiality concerns. Strikingly absent in this litigation, however, is any *current* expression of the Executive branch's views as to the affect that FACA would have on the President. One searches the DOJ's Matthews Declaration in vain for any objection to FACA. J.A. 20-22. There is not even a hint in that Declaration as to what, if anything, in the judicial selection process must be kept confidential, or whether FACA would not be able to accommodate whatever confidentiality concerns the Executive may have. Surely, it is not asking too much that, before a Court strikes FACA down entirely as unconstitutional, some record evidence be submitted by the Executive indicating that the President requires the ABA's advice in order to carry out his nomination powers, and that FACA would prohibit him from getting it. In addition, if DOJ wishes to invoke "executive privilege," it must, of course, do so in the proper fashion rather than hint at it. *United States v. Reynolds*, 345 U.S. 1 (1953).[13]

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[13]Indeed, neither the DOJ nor the ABA define precisely what information must be kept confidential. If only the *name* of the source is thought necessary to be kept confidential, that is not a reason why all information provided by that source must remain confidential. If a source provides favorable information about a candidate and expressly waives any confidentiality, there appears to be no valid reason to insist on confidentiality in that situation either. A list of questions that committee members may use in evaluating the candidate or for eliciting information from sources, for

A recent decision by this Court concerning the Freedom of Information Act illustrates the scope of the exemptions found therein, and by reference, in the FACA as well. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 57 U.S.L.W. 4373 (March 22, 1989), the Justice Department was successful in persuading this Court that 5 U.S.C. § 552(b)(7)(C) permitted DOJ to withhold the release of Federal Bureau of Investigation (FBI) "rap sheets" containing public criminal records of individuals. While the underlying information on those documents were public, the Court nevertheless held that their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under the FOIA exemption. *Id.*

While the privacy exemption found in 5 U.S.C. § 552(b)(6), the Sunshine Act's analogue to the (b)(6) exemption in FOIA, is the one usually invoked by advisory committees which have personnel screening functions similar to the ABA Committee, the *Reporters Committee* decision nevertheless illustrates the accommodating nature of FOIA, and hence, of FACA.[14] That case is also instructive since the Court was able to differentiate between the varying interests underlying the FOIA request. The Court emphasized that the policy of FOIA "focuses on the citizens' right to be informed about 'what their government is up to,'" as opposed to obtaining information about a private individual. *Id.* at 4380. Similarly, appellants have a right under FACA,

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example, should also pose no confidentiality concerns. The ABA has publicly released certain information about particular investigations without its functions being impaired. *See Confirmation Hearings* 318-23. There is no reason why similar information concerning other investigations cannot be released as well.

[14] *See, e.g.*, President's Advisory Committee on Ambassadorial Appointments, 42 Fed. Reg. 64940 (1977); National Institutes of Health "peer review" advisory committee, 53 Fed. Reg. 49794 (1988).

at a minimum, to obtain information regarding the procedures used by an advisory committee, such as the ABA, to screen federal judicial candidates.

Even if certain documents or meetings are found to be disclosable under FACA, such a result would not violate the President's nomination power and thereby cause a breach of the separation of powers. DOJ claims that the functional or balancing test in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) is inappropriate here, and that a formalistic approach should be used. DOJ is mistaken since the pardon cases and others cited by DOJ for this proposition are inapposite in this case.

In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) and its progeny, the Court struck down acts of Congress that sought to nullify the legal effect of a pardon conferred by the President. No such usurpation or nullification of any substantive power of the President is caused by FACA in this case. The more apt question to ask with respect to the pardon power is whether *Ex parte Garland* would hold unconstitutional FACA's application to a hypothetical "ABA Defense Lawyers Committee on Pardons" that provided preferred advice to DOJ's Pardon Attorney under 28 C.F.R. Part 1 as to whether applicants for pardons or clemency are worthy of it. We think not.[15] All the more so should FACA not be found unconstitutional with respect to the DOJ's utilization of the ABA Committee regarding applicants for judicial posts, especially where, unlike the the case

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[15]DOJ's position would call into question the constitutionality of laws such as FOIA with respect to the exercise of exclusive executive powers. *See, e.g., Crooker v. Office of Pardon Attorney*, 614 F.2d 825 (2d Cir. 1980); *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977)(prosecutor memorandum regarding effect of pardon on future criminal prosecutions disclosable if adopted as a final decision); *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980). It would also call into question the host of laws which specify the qualifications and characteristics of the person to fill the office. *See, e.g.*, 15 U.S.C. § 41.

with the pardon power, the Senate has an express constitutional role to play in the appointment process.

The proper separation of powers analysis is the functional or balancing test which examines the extent to which FACA "prevent[s] the Executive Branch from accomplishing its constitutionally assigned function." *Nixon v. GSA*, as well as whether the Congress has sought to aggrandize its power at the expense of the Executive. *See Morrrison v. Olson*, 108 S.Ct. 2797 (1988). The appellants and the lower court simply come up short in demonstrating how FACA, which would apply only to the input from the ABA Committee and not the other numerous sources of information DOJ claims is used by the President, would prevent the President from appointing individuals of his own choosing, especially where, for almost 150 years, the President was able and, with respect to Supreme Court nominees, is still able, to make excellent judicial nominations without the ABA's help at all. Nor do appellees claim FACA aggrandizes any power in the Congress, nor could they, since FACA's administration is left in the hands of the Executive.[16]

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[16]Both the DOJ and ABA are unable to adequately refute appellant's argument (WLF Br. at 35-36) that the last part of the Necessary and Proper Clause ("to make all Laws which shall be necessary and proper for carrying into Execution... *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" Art. I, § 8, cl. 18) (emphasis added) provides Congress with ample authority to regulate the government's use of trade groups and other committees seeking to influence the governmental decision-making process. The ABA's single sentence response, that "Congress' power under this clause . . . is 'inevitably bounded by the express language of Art. II, § 2, cl. 2,'" citing *Buckley v. Valeo*, 424 U.S. at 138-39 (1976), is particularly weak. ABA Br. at 34, n.37. The ABA has not shown how FACA constitutes a congressional usurpation of the express nominating power of the President as did the law under scrutiny in *Buckley v. Valeo*, where Congress attempted to give itself the actual power to nominate officers.

The DOJ's response to our Necessary and Proper Clause argument is equally superficial. DOJ simply opines that "it would not be 'necessary and proper' within the meaning of Article I, sec. 8, for Congress to enact legislation that so fundamentally intrudes on powers exclusively granted to

While appellants believe that the separation of powers would not be violated if FACA were to apply, this Court need not reach that issue in order to reverse the lower court. In a case that was in a posture strikingly similar to the one at bar, the United States Court of Appeals for the District of Columbia Circuit, in an unanimous opinion, disposed of the matter as follows:

> The Council [on Environmental Quality] contends... that if the [Sunshine] Act is construed to cover its rendition of advice to the President, such application would violate the separation of powers and impair the President's authority under article II, Sec. 2, cl. 1 of the Constitution to require the opinion of executive branch officers. It therefore urges us to construe the Act as inapplicable to that function in accordance with the settled rule that, where possible, a statute should be interpreted so as to avoid constitutional defects. *See, e.g., International Association of Machinists v. Street,* 367 U.S. 740, 749-50, 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961).
>
> For the reasons previously given, we do not think the Sunshine Act properly may be construed as inapplicable to the Council in its function of advising the President. Furthermore,

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the President." DOJ Br. at 43, n.47. Yet the DOJ has not demonstrated how FACA "so fundamentally intrudes" on the President's power of nomination, especially where the administration of the law is left in the Executive's hands.

The Necessary and Proper Clause can also be considered as additional authority for FACA to support the Advice and Consent power of the Senate and other powers the Congress enjoys with respect to the judiciary. Congress could reasonably consider it "necessary and proper" to have FACA apply to the ABA Committee to ensure efficiency and accountability, and to expedite the confirmation role by ensuring the integrity of the ABA evaluations. *See generally, Confirmation Hearings, supra.*

> as noted, the Council has not thus far sought to close particular meetings at which such advice is to be deliberated, but has instead sought totally to exempt such meetings from the Act. The constitutional issues thus are posed in an abstract context that is inappropriate for their adjudication. It may be that by closing certain meetings, the Council could avoid possible constitutional problems. We apply the settled rule that federal courts "will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. TVA*, 297 U.S. 288, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring.)

Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (D.C.Cir., 1980).

CONCLUSION

For these reasons, and those expressed in our opening brief, the lower court's opinion should be affirmed with respect to its resolution of the statutory issue, but should be reversed and remanded with respect to the constitutional issue.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-429 and 88-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and AMERICAN BAR ASSOCIATION,

Appellees.

WASHINGTON LEGAL FOUNDATION,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and AMERICAN BAR ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING APPELLEES

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING APPELLEES

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 87 national and international unions with a total membership of approximately 13,500,000 working men and women. The AFL-CIO is an active participant in the national political process and has a continuing interest in the constitutional and statutory principles governing communications between private groups and elected officials, including the President and his agents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold merits question here is one of statutory interpretation: Does the Federal Advisory Committee Act, 5 U.S.C. App. 2 ("FACA" or "the Act"), prohibit the President, in the process of making nominations to the federal bench, from consulting with the American Bar Association's ("ABA") Standing Committee on the Federal Judiciary, unless the Committee is willing to subject itself to a considerable degree of governmental intervention and supervision.[1]

In our view, such a result would constitute a significant, and very likely an unconstitutional, departure from

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[1] The Committee consults with the Attorney General acting on behalf of the President, rather than directly with the President. In this context, however, the Attorney General is acting as an agent and advisor to the President with respect to the President's exercise of the appointment power. And where officers such as the Attorney General "act by [the President's] authority, and in conformity with his orders . . . their acts are his acts." *Marbury v. Madison*, 5 U.S. 137, 166 (1803) (Marshall, C.J.).

the traditional understanding that the President is free to consult with his constituents in the exercise of responsibilities of a discretionary and political character. The intention to accomplish such a departure should not lightly be attributed to Congress.

In this instance, moreover, Congress in fact had much more mundane, traditional, and unquestionably valid objectives in enacting FACA: the prevention of wasteful expenditures of the federal government's funds by the executive branch for the establishment or support of advisory committees, and the prevention of the abuse of such advisory committees by interested private parties to subvert or improperly influence the enforcement of congressionally enacted regulatory schemes.

It is our submission that FACA should be construed to apply in a manner congruent with these expressed concerns of Congress—*viz.*, only (i) where federal funds are spent to maintain or support an advisory committee, or (ii) where an advisory committee's advice or recommendations concern the enforcement or implementation of congressionally mandated policies.

The general statutory language used to achieve the expressed congressional objectives should not be read to reach beyond these objectives to effect a gratuitous interference with the traditional political relationship between the President and his constituents—a result never mentioned, much less intended, by the Congress that enacted FACA. Accordingly, FACA should be interpreted not to apply to the President's, or his agents', consultation with associations of his constituents in connection with the exercise of those of the President's responsibilities that are discretionary and political in character.

The ABA Committee was created by an association of constituents—the attorneys who are members of the organized bar—as part of that associations' efforts to influence its elected political representatives; the committee is not financed by federal funds. And the presidential responsibility here at issue—the nomination of appoint-

ees to the federal bench—has throughout our history been understood to be a function as to which the President is subject to constraints only of a political nature. Therefore, FACA should have no application to the President's consultation with the ABA Committee respecting the nomination of federal judges.

In part I of this brief, we show that the language of the Act, taken as a whole, and the Act's legislative history support the interpretation just stated. Appellants' broad reading of FACA to apply to presidential consultations of the kind before the Court would result in unprecedented congressional intrusion into, and regulation of, the heretofore unrestricted political relationship between a President and his constituents. Congress should not be found to have intended such a remarkable departure from the traditional understanding and practice absent a clear expression of that intention. Here the legislative materials disclose no such intention. To the contrary, in enacting FACA, Congress was concerned only with matters well within the realm of traditional congressional regulation: the use of congressionally appropriated funds and the enforcement of congressionally enacted regulatory schemes.

In part II of this brief, we show that the conclusion that FACA was not intended to cover a case such as this is reinforced by an additional consideration. Application of FACA to the President's consultations with the ABA Committee respecting nominations to the federal judiciary would raise a most serious constitutional question. The process of governance established by the Constitution is premised on the political tension that inheres in the relationship between the elected branches of the federal government, which allows for government action within a context protective of individual liberty. For that tension to be maintained at the level the Framers envisioned, each branch must be equally able to compete for political support. Legislation that interferes in the legitimate political relationships between a President and his

constituents thus threatens the balance of political power between the legislative and the executive intended by the Constitution.

This Court has repeatedly held that Congress should not lightly be found to have enacted legislation of dubious constitutionality, or to have ventured inadvertently into an area of constitutional concern. Given the serious nature of the constitutional concerns raised by appellants' proffered interpretation of the FACA, and the absence of any indication that Congress meant to legislate in this sensitive area, proper respect for Congress requires a construction that limits FACA's scope to those situations Congress clearly intended to cover: *viz.*, the situations where congressionally appropriated funds or congressionally prescribed policies are at issue.

ARGUMENT

I. THE LANGUAGE, HISTORY, AND PURPOSES OF THE STATUTE

A. The Rule of Construction

Appellants' basic claim is that the "plain meaning" of FACA dictates that, except as to the handful of advisory committees expressly exempted, the Act covers each and every private group from which the President seeks advice of any type on any subject germane to the exercise of any presidential power.[2] This argument is predicated on the language of the definitional provision of FACA, § 3(2):

> For the purpose of this Act—
>
> • • • •
>
> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any sub-

[2] *See* Brief for Appellant Public Citizen ("PC Br.") at 15-17; Brief of Appellant Washington Legal Foundation ("WLF Br.") at 15-18. See also note 3, *infra*.

committee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

* * * *

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

We have no dispute with the point that "utilize" is a broad term used here without any express limitations and in the disjunctive, and that this language, taken in isolation from the remainder of the Act, is susceptible of the interpretation urged by appellants. But the broad potential sweep of the language used by Congress does not end the inquiry as to how that language is to be construed. Indeed, the very breadth of the language warns against too broad an interpretation. *See Nader v. Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975) (warning that § 3(2)'s "very broad, imprecise definition . . . is not a model of draftsmanship" and that its "very vagueness and sweeping character" allows inclusion of groups not intended by Congress).[3]

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[3] Appellants, in order to bolster their contention that this case can be determined under § 3(2)'s plain language, refer to various lower court cases and recent administrative regulations of the General Services Administration. *See* PC Br. at 17-20; WLF Br. at 18-20.

Those materials, far from supporting a "plain language" argument, represent repeated efforts by the lower courts and the agencies to cabin the seemingly boundless language of § 3(2). Thus, while arguing "plain language," appellants accept that § 3(2) may have no application "where an agency actively solicits from many

Caution is particularly appropriate here because the broad interpretation urged by appellants would have remarkable and unprecedented consequences. So far as our researches show, in our constitutional history, Congress has never sought to intrude upon the President's ability to consult with his constituents on matters over which the President has discretion to act subject only to constraints of a political nature. We digress for a moment —foreshadowing Part II of our argument—to note the significance for present purposes of that aspect of the President's office.

To a large extent, the duties of the President are defined and circumscribed by Congress. Article II, § 3 of the Constitution requires the President to "take care that the laws be faithfully executed," a requirement that covers the laws enacted by Congress. The consequence of that duty is that the President often serves in effect as the agent of Congress. Moreover, under Article I, § 9, cl. 7, the President is dependent on Congress for the appropriation of the funds he may need to accomplish many of his objectives.

But the President is in no wise a mere agent or dependent of Congress. The President is the elected and politically responsible head of the executive branch. As

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outside institutions," PC Br. 17, where the committee has no "preferred" status, PC Br. at 18, WLF Br. at 19, where the agency does not "lean[] strongly" on the committee, PC Br. at 19, where meetings are on an "ad hoc" basis, *id.* at 20, or involve no "request[s] for specific recommendations on a particular matter." *Id.* But appellants do *not* explain where any of those limitations is found in § 3(2)'s language.

The administrative regulations cited, which were adopted 15 years after the statute, are, moreover, entitled to little deference. *General Electric v. Gilbert*, 429 U.S. 125, 142 (1976) (refusing to defer to regulations promulgated 8 years after enactment). And, none of the court cases cited confronted questions analogous to those presented here.

Thus, the salient point here is that these sources demonstrate that all have recognized that § 3(2)'s vague and broad language must be subject to some limits not gleaned from the dictionary.

such, he has independent political status equal to that of Congress, and he is intended, under the constitutional design, to serve as a political counterweight to Congress. Apart from his responsibility to execute laws enacted by the Congress and his dependence on Congress for appropriated funds, there are numerous areas where the President may act independently, with unbounded political discretion—*viz.*, where his discretion is subject only to the constraints of the political process. The initiation of legislative proposals, Art. II, § 3, the exercise of the veto power, Art. I, § 7, cl. 2, and the nomination of appointees to certain federal offices, Art. II, § 2, cl. 2, are the most pertinent examples. The function at issue here —the nomination of appointees to the federal bench— has long been understood to be an exercise of this kind of presidential discretion.

Throughout our history an important incident of the President's political role has been the freedom of the President to consult with constituents, and with groups of constituents, as the President may deem appropriate, including those with a strong interest in the outcome of the particular presidential decision under consideration. Only through such consultation can a President remain responsive to his constituencies and build the coalitions that are essential to his political efficacy.

The President's consultations with the ABA must be understood in this context. The ABA, a private association of attorneys, has chosen to form a select group to reflect and assert the ABA's views on prospective nominees or nominees for the federal bench: the ABA Committee. *See generally* J. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection*, 49-81 (1965) (tracing history of the ABA's and the Committee's involvement in judicial selection). The ABA Committee was thus not established by or at the request of the government, and the Committee receives no financing from the government. It is a private organization, representing a segment of the electorate wishing to commu-

nicate its views as to how the Chief Executive should exercise his political discretion. And it is a group whose views the President evidently values, whether for political or for other reasons. The Committee is in other words a classic example of a private constituent group.

The ABA and its Committee are, accordingly, in the same posture with respect to coverage under the FACA as myriad private groups in our society, established and maintained without government involvement, to whom a President may—and often does—turn in making decisions of a political nature. Thus, for example, in making nominations to particular federal offices, in determining particular legislative initiatives, or in making particular veto decisions, a President may consult with representatives of political parties, business associations, labor organizations, anti-abortion or "pro-choice" groups, or consumer, environmental, educational, veterans, religious, or civil rights groups, and on and on.

If presidential consultation with the ABA Committee subjects that Committee to the government intervention required by FACA, then similar consultations with committees from these other constituent groups would equally lead to FACA coverage. Thus, for example, under appellants' view of the statute, a President's consultation with committees of his political party (*e.g.*, the Republican National Committee) respecting a judicial nomination—or, indeed, any public policy issue—would render those groups "advisory committees" subject to FACA.

The radical nature of this result can be seen in the consequences of FACA coverage for the affected private groups. Far from trivial, these consequences intrude into the very core of the groups' associational integrity and freedom. At a minimum, a group classified as an "advisory committee," would lose its ability freely to meet, deliberate or determine its own agenda. FACA, § 10(e), (f) (all meetings of advisory committees must be called

and chaired, or at least attended, by a government officer or employee, who must have authority to approve agenda and adjourn meetings). And, the group would lose control of all its reports, records, and other papers. FACA, § 8(b) (head of agency will appoint officer who will assemble and maintain all advisory committee reports, records and other papers, and produce them subject to the Freedom of Information Act). Certainly, few private associations would tolerate such intrusions, and the imposition of such intrusions would certainly burden the President's ability freely to consult with such groups. *Cf. Eu v. San Francisco Co. Democratic Central Committee*, —— U.S. ——, 57 U.S.L.W. 4251, 4255 (1989) (fundamental right of association includes association's right "to organize itself, conduct its affairs, and select its leaders").

On the face of things, it would seem unlikely that Congress intended such intrusive requirements to apply to those private groups of constituents—not established by, or at the request of, or financed by, the government —that the President chooses to consult in the process of making decisions committed to the President's political discretion. And as this Court has recognized, Congress sometimes speaks in statutory language so general that the words provide a handle for regulating matters Congress, in fact, had no desire to regulate. These are the situations for the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *The Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

Particularly where applications of a generally worded statute would represent unlikely and controversial departures from traditional understandings on matters of great sensitivity and moment, this Court has required a clear statement in the statute's language or history of an intent to effect such a departure before assuming

that Congress intended to go so far. Where there is no such clear statement, as there was not in *Church of the Holy Trinity*, this Court "presume[s] that the Legislature intended exceptions to its language which would avoid results of this character." *Id.* at 461.

Indeed, *Church of the Holy Trinity* is peculiarly in point here, because, aside from the general rule of construction articulated there, that case on its facts presented a problem that, as we establish in succeeding sections of this brief, *infra* at 11-22, is nearly identical to the problem posed here. Thus, the following passage from *Church of the Holy Trinity* has particular relevance for the case at hand:

> The [plain language] construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute. [*Id.* at 472.]

The Court has repeatedly followed this approach, especially in cases involving well-established and sensitive governmental relationships. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). *See also, e.g., Department of Navy v. Egan*, —— U.S. ——, 108 S.Ct. 818, 825 (1988) (Congress must be specific to

intrude into Executive's authority over military); *Heckler v. Chaney*, 470 U.S. 821, 832-835 (1985) (Congress must be specific to deny Executive's enforcement discretion); *Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 355 (1941) (Congress must be specific to supplant traditional state police powers); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940) (same).

It is against this "clear statement" standard that the language of the Act and the relevant historical materials should be measured.

B. The Language of the Act

Appellants have placed the whole weight of their "plain meaning" argument on a single word, "utilize," in the definitional section of FACA. Because the President "utilizes" the ABA Committee for advice, they argue, the Committee is covered. But a fair reading of the Act as a whole leads to the conclusion—confirmed by the legislative history, *infra* at 12-22—that Congress had no thought at all of regulating the kind of presidential consultation here at issue.

Most of the Act's provisions are clearly intended to govern not private groups, in the normal sense, but entities having an official status, whose existence arises and depends on government actions. Thus, the Act provides that advisory committees are not permitted "to meet or take any action" until a charter has been filed stating, *inter alia*, their "official designation" and "objectives," "the period of time necessary . . . to carry out [their] purposes," "the agency responsible for [their] support," their "estimated annual operating" budget, and their expected "termination date." § 9(c). And, the Act requires that all advisory committees "in existence" on the Act's effective date, "shall [be] terminate[d] not later than" two years after that date. § 14(a)(1).

Indeed, virtually all of the Act's requirements—for example, those providing for detailed oversight of advisory

committee activity by Congress, § 5, the Administrator of General Services, § 7, and the relevant agency heads, § 8; those requiring Federal Register notices before meetings and detailing required meeting procedures, § 10; and those creating a depository in the Library of Congress for all committee reports, § 13—reflect that this is a scheme to govern entities working within the government's administrative processes, and not to govern private constituent groups consulting with their elected representatives on matters of a political and discretionary nature.

Nowhere in the Act's operative provisions is there even one word reflective of any concern for, or sensitivity to, the issues that regulating such consultations would raise. Certainly, there is nothing on the face of the Act that provides the "clear statement" of intention that this Court should require in order to find that the activities in this case were meant to be regulated. See *supra* at ——.

C. The Legislative History of the Act

FACA, as finally passed and signed into law in 1972, was the product of over 15 years of congressional inquiry into the executive branch's uses and misuses of "advisory committees." A review of this lengthy history demonstrates that at no point did Congress see its regulations as affecting the traditional practice whereby Presidents consult with private interest groups prior to making those decisions for which the President has independent political discretion. Indeed, the legislative record reflects that everyone concerned—in Congress and in the executive—saw advisory committee regulation as a conventional addition to the body of established administrative law, reflecting conventional legislative concerns.

1. H.R. 7390, passed by the House of Representatives in 1957, was the first legislative attempt to regulate executive branch "advisory committees." [4]

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[4] Subcommittee of the Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., Federal Advisory Committee Act Sourcebook: Legislative History, Texts, and other Documents (Committee Print

The bill resulted from an extensive government-wide survey by the House Subcommittee on Executive and Legislative Reorganization on the executive bureaucracy's use of experts, consultants, and advisory committees.[5] This survey revealed that 1700 to 1800 federally-established advisory committees existed in the executive departments,[6] "to a large degree exercis[ing] the same type of advisory functions as those performed individually by . . . consultants."[7] The use of experts and consultants was already highly regulated, but no such regulation existed for "advisory committees." As the bill's author, Representative Fascell, explained:

> The individual consultant . . . usually has the status of Government employees for most purposes and as such is subject to certain statutory and regulatory requirements as to employment, duties, and qualifications [and is] subject to the conflict of interest statutes and other laws and regulations governing the conduct and ethics of Government employees. On the other hand, . . . members of advisory committees are not considered to be employees of the government. They are not subject to any of the laws or regulations which restrict the activities of Government employees, and yet through their advisory functions they are often instrumental in guiding the formation of official Government policy. [Sourcebook at 79 (reprinting comments of Rep. Fascell).]

H.R. 7390, entitled, "a bill to amend the Administative Expenses Act of 1946, and for other purposes," was an effort to cure this perceived anomaly. Drafted in the

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prepared by Congressional Research Service 1978) ("Sourcebook") at 40.

[5] *See* Sourcebook at 4-5. For the results of this survey, see Committee on Government Operations, 84th Cong., 2d Sess., Replies from Executive Departments and Federal Agencies to Inquiry Regarding Use of Advisory Committees (Committee Print 1956) (6 volumes).

[6] Sourcebook at 47 (H.R. Rep. No. 576, 85th Cong. 1st Sess. (1957)).

[7] *Id.* at 79 (103 Cong. Rec. 11247-11266 (1957) (Rep. Fascell).

form of an amendment to the principal statute regulating the federal departments' use of experts and consultants,[8] Sourcebook at 54 (H.R. Rep. No. 576, *supra*), the bill's requirements were designed to allow Congress to monitor advisory committees in order to assure their responsible, effective and legitimate use.[9] As the House Report explained, the bill "will serve to create and maintain a factual record from which Congress may be kept informed and, therefore, may be better able to give intelligent consideration to the possible necessity for further legislation in this area." *Id.* at 48.

H.R. 7390 was passed by voice vote in the House, Sourcebook at 107 (103 Cong. Rec. 11265-11266 (1957)), but no action on the bill was taken in the Senate. Nevertheless, H.R. 7390 has proved to be of continuing significance.

First, almost all of H.R. 7390's requirements and standards were eventually embodied in similar form in FACA. For example, that bill provided that a department could only establish an advisory committee if there was a statute specifically authorizing that action or an administrative finding of need, and the bill required the department to report details of the committee's expected activities, costs, and duration, H.R. 7390, § 15A(a); required that each advisory committee's meetings be convened at the call of, and under the chairmanship of, a federal officer or employee and that the attendance, discussions, and conclusions of each meeting be reflected in full minutes, § 15A(b)(1-3); required the President to

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[8] *See* Administrative Expenses Act of 1946, ch. 774, 60 Stat. 806, as amended.

[9] There had been previous investigations by Congress and the Antitrust Division of the Justice Department into allegations that business leaders serving on advisory committees to regulatory agencies had at times used those committees for exchanges of information in violation of the antitrust laws and for other illegal purposes. Sourcebook at 46 & 48 (H.R. Rep. No. 576, *supra*). The House Report explained that such activities could be better monitored under the standards of the bill. *Id.*

make annual reports on the Executive's use of advisory committees, § 15A(c)(2); and, prohibited advisory committees from engaging in activities that were not solely advisory in nature, § 15A(b)(4). *Compare* FACA, §§ 6(c), 9(a-c), & 10(c, e-f) (containing similar requirements).

Second, H.R. 7390 did not specifically define the term "advisory committee," but its text and the House Report made clear that only groups established by, and given official status within, the executive branch were covered. At the bill's core was the provision that no advisory committee be "establish[ed] in a department," except in conformance with the bill's requirements. H.R. 7390, § 15A(a). And, as already noted, the bill was based on the parallel between advisory committees and experts and consultants, and the recognition that the latter had already been given "the status of government employees for most purposes." Sourcebook at 79 (Rep. Fascell); *see also id.* at 54 (H.R. Rep. No. 576, *supra*). Moreover, as the House Report made clear, one of the purposes of the bill was to mandate that, once established, "advisory committees [were to be] treated as government instrumentalities." *Id.* at 45. No committees privately-formed by constituent groups were discussed.

Third, the bill was entirely focused on the use of advisory committees by agencies administering programs created by federal statutes passed by Congress. *Id.* at 45. No committee advising the President on his performance of functions subject only to political constraints was ever discussed.

2. Congress again expressed concerns regarding advisory committees during the Ninety-First Congress (1969-1970), when committees in both the House and Senate held hearings on the subject. Subsequent to the House's passage of H.R. 7390, the President had issued Executive Order 11007, which adopted many of the requirements of H.R. 7390 as internal administrative policy. Sourcebook at 108 (27 Fed. Reg. 1875 (1962)).

The activities of each congressional committee reflected discontent with the management of advisory committees under the Executive Order. These inquiries led, in the next Congress, to the passage of FACA.

In the House, the Special Studies Subcommittee of the Committee on Government Operations began to study allegations that executive advisory committee practices were wasteful and inefficient. After an elaborate study and survey and five days of hearings,[10] the subcommittee issued a report ("the 1970 Report") finding that, despite Executive Order 11007, advisory committees had remained relatively unmonitored, unregulated, and wasteful.[11] The number of committees had grown to between 2600 and 3000, their cost had become "considerable," and many continued in existence although no longer serving any purpose. Moreover, the useful work of many committees often became lost or irretrievable. The subcommittee's report made 14 specific findings and 20 recommendations, all relating to efficiency and cost concerns. *See* Sourcebook at 214-237.

This inquiry, for the first time, examined presidential study commissions as part of the advisory committee issue. Focusing entirely on issues of cost and management, the subcommittee identified "198 Presidential committees with annual estimated operating costs of nearly $50,000,000." Sourcebook at 223. The 1970 Report explained that "because of [these] significant operating costs Presidential committees were given special attention by the Subcommittee." *Id.* Many presidential committees were unmonitored, mismanaged, wasteful, obsolete or duplicative. Some virtually never met despite having members, budgets, and staffs. Others, in the midst of their activities were disavowed by the White House.

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[10] Hearings before a Subcommittee of the House Committee on Government Operations: Presidential Advisory Committees, 91st Cong., 2d Sess. (1970) (2 volumes).

[11] *See* Sourcebook at 214-237 (H. Rep. No. 1731, 91st Cong., 2d Sess. (1970) ("1970 Report")).

Often after an expensive study, the resulting report was wholly ignored. *Id.* at 224-226. As the subcommittee concluded, through these advisory committees "the Executive Branch wastes very considerable public funds." *Id.* at 225.[12]

In the Senate, the advisory committee hearings had a quite different focus. Senator Metcalf had introduced S.3067, a bill "to amend the Federal Reports Act of 1942 so as to provide for consumer, small business, and labor representation on Budget Bureau advisory committees." Sourcebook at 116 (115 Cong. Rec. 31270-31278 (1969). And, the resulting hearings focused on that bill.

The basic issue raised by S.3067 was the undue influence of interest groups on regulatory policy as a result of the regulatory agencies' establishment of business advisory groups. The Federal Reports Act[13] had required that the Budget Bureau approve all questionnaires that federal regulatory agencies wished to send to the public. As part of its program, the Bureau had requested representatives of business interests to form the Advisory Council on Federal Reports ("ACFR"), whose committees evaluated each suggested form. *Id.* at 116, 126-128. In Senator Metcalf's view, these committees frequently used their official advisory positions to "frustrate the collection and publication [by the regulatory agencies] of

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[12] It should be emphasized that all of the presidential advisory committees examined by the subcommittee were officially established and federally financed committees. The range of Presidential advisory committees discussed in the report is reflected by the following list: the President's Commission on Campus Unrest (Scranton Commission), the President's Commission on Obscenity and Pornography, the National Commission on the Causes and Prevention of Violence (Douglas Commission), the National Advisory Commission on Civil Disorders (Kerner Commission), the President's Council on Physical Fitness and Sports, and the President's Temporary Commission on Pennsylvania Avenue.

[13] Federal Reports Act of 1942, ch. 811, 56 Stat. 1078.

information" necessary to pursue proper policies. *Id.* at 124. Moreover, these committees were comprised only of representatives of business intesests, and their meetings were often closed to the public. *Id.* at 126-129.

While Senator Metcalf's bill only applied to the Budget Bureau—prohibiting its use of any "advisory committee" to enforce the Federal Reports Act unless the committee included labor, small business and consumer representatives—the hearings also examined many other advisory committees representing business interests that had been established at other regulatory agencies.[14]

3. Based on the House and Senate hearings in the prior Congress, bills on the regulation of advisory committees were introduced in both the House and Senate in the Ninety-Second Congress.

In the House, Representative Monagan, who had chaired the Special Studies Subcommittee in the Ninety-First Congress, introduced H.R. 4383, which incorporated many of the provisions from H.R. 7390 and most of the recommendations from the 1970 report. After a one day hearing,[15] the bill was reported with amendments to the full House by the Government Operations Committee.[16]

As explained to the House, the bill was designed to eliminate wasteful expenditures and thus save federal funds. As the sponsor put it, the bill would provide for "the efficient functioning of Government agencies, and . . . perform a housekeeping function that is not being performed at the present time." Sourcebook at 293 (118

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[14] *See generally* Hearings before a Subcommittee of the Senate Committee on Government Operations: Advisory Committees, 91st Cong. 2d Sess. (1970-1971) (3 volumes).

[15] Hearing before a Subcommittee of the House Committee on Government Operations: Advisory Committees, 92d Cong., 1st Sess. (1971).

[16] Sourcebook at 271 (H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972)).

Cong. Rec. H4272-H4286, (Rep. Morgan).[17] H.R. 4383 also drew on the previous year's Senate hearings: the bill included guarantees of open meetings, and conflict of interest prohibitions for advisory committee members, and, in the brief floor debate, a number of representatives commented on the problems that groups like the ACFR had caused in the regulatory process. *See, e.g., id.* at 306 (Rep. Dingell).

After floor debate in which virtually every speaker favored the bill, it was passed by a large bipartisan margin of 357 to 9.[18] Sourcebook at 291-313 (118 Cong. Rec. H4274-H4286 (1972)). With further amendments in Conference, H.R. 4383 emerged as FACA.

A number of points should be made about H.R. 4383, as passed by the House. First, although the bill explicitly governed presidential advisory committees, treating those and other advisory committees simliarly, the only references to presidential committees in the House Report or on the floor were directed at their costly and inefficient use of federal funds. *See, e.g., id.* at 293 (Rep. Monagan). There were no references to the manner in which the President consults with his constituents regarding his exercise of political discretion.

Second, the bill only governed committees "established by" statute, by the President, or by government agencies. Sourcebook at 301. The debate repeatedly referred to the publicly-financed and "quasi-governmental" status of the groups under consideration. *See, e.g., id.* at 297 (Rep.

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[17] *See also id.* at 294 (Rep. Horton) (goal is "sensible management of the finances"); *id.* at 295 (Rep. Holifield) (committees cost $75 million per year and use over 20,000 federal employees); *id.* at 299 (Rep. Randall) (bill will eliminate waste).

[18] The votes against the bill appear to have been based on the concern that allowing the Office of Management and Budget to monitor the advisory committee practices of the independent agencies would compromise those agencies' independence. All of those representatives who expressed this concern otherwise expressed support for the goals of the bill. *See, e.g.*, Sourcebook at 288 (views of Rep. Moss).

Moorhead). The House Report explained that the term "established by" was to be interpreted as including groups like the ACFR (the business advisory committee to the Budget Bureau), *see id.* at 274, explaining that ACFR "was organized . . . at the request of the Office of Management and Budget." *Id.* at 276.

In the Senate, the Ninety-Second Congress saw the introduction of three advisory committee bills. First, Senator Metcalf introduced S. 1637, which, based on the hearings of the previous year, called for uniform standards requiring open meetings and public membership for all advisory committees. The bill made no reference to presidential advisory committees, referring only to "federal agenci[es]"; and in his floor speech introducing the bill, Senator Metcalf spoke only of committees established by various regulatory agencies. Sourcebook at 132-138 (117 Cong. Rec. 11442-11445 (1971)). Second, Senator Roth introduced S. 1964, which was modeled on H.R. 4383. *Id.* at 139-144 (117 Cong. Rec. 17070-17072 (1971)). And, third, Senator Percy introduced S. 2064, which contained provisions drawn from both S. 1637 and S. 1964. *Id.* at 145-150 (117 Cong. Rec. 19802-19805 (1971)).

Extensive hearings were held again,[19] and a compromise bill, S. 3529, combining features of the Metcalf, Roth and Percy bills, was introduced and reported to the floor. *Id.* at 14-16, 173; *see also id.* at 158 (S. Rep. No. 1098, 92d Cong., 1st Sess. (1972)). With virtually no debate on the merits, the bill was passed by voice vote. *Id.* at 192-213 (118 Cong. Rec. S14644-S14655 (1972)).

Again, nothing in the extensive Senate hearings reflects any inquiry into, or any interest in, the ways in which the President gains advice from interested private groups regarding his independent political decisions. As

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[19] Hearings before a Subcommittee of the Senate Committee on Government Operations: Advisory Committees, 92d Cong., 1st Sess. (1971) (3 volumes).

in all previous hearings and reports, all references to undue interest group influence in the government were in the context of agency enforcement of Congress's statutory policies.

Moreover, in similar fashion to the House bill, S. 3529 applied only to committees "established or organized by" the President or the agencies. *Id.* at 158 (S. Rep. No. 1098, 92d Cong. 1st Sess. (1972)). The Senate Report—like the House Report—explained that this term must be construed to apply to groups such as the ACFR, explaining that the ACFR was a group that was "br[ought] together" by a government officer. *Id.* That comment can hardly be taken to evince an interest in bringing under the bill's coverage privately formed, preexisting constituent groups.

Although a variety of issues were reconciled in conference, the only one of relevance here is the change in the definition of "advisory committee" to include committees "established or utilized by" the President or the agencies. Sourcebook at 316 (H.R. Rep. 1403, 92d Cong. 2d Sess. (1972)). To make clear that this change was intended *only* to expressly cover groups like the ACFR—*viz.*, groups formed at the behest of the government, although not directly by the government—the Conference Report stated that "[t]he Act does not apply to advisory committees not directly established by or for [the] agencies." *Id.* at 324.

The Conference bill was then passed in both chambers by voice vote, with virtually no debate. Soon after its passage, the President signed the bill into law. Sourcebook at 19.

4. The history of the Ninety-Second Congress's consideration and passage of FACA serves to reaffirm the points already made with respect to the treatment of advisory committees by earlier Congresses.

First, no discussion occurred on the floor, in the reports, or in the hearings that would indicate any intent to regulate—or any belief that the bill would regulate—

the President's consultation with constituent groups regarding those of his duties that are of an independent political nature. Indeed, the repeated passage of bills by overwhelming majorities, often by voice votes, with little or no debate, belies the view that Congress intended to limit such a basic and traditional presidential prerogative.

Second, the fact that the Executive never opposed these bills on separation of powers grounds also cuts against an expansive reading of the resulting legislation. Although expressing a preference for leaving advisory committee issues to internal administrative resolution, the Nixon Administration did not provide significant opposition to FACA, and the President signed the bill into law.

Third, the congressional concerns that were stated as requiring a legislative response were of the most traditional type. Congress was motivated, on the one hand, by an interest in reducing wasteful use of congressionally appropriated funds, and on the other, by an interest in protecting the bureaucracy from undue interest-group influence in the enforcement of congressionally enacted statutes. These traditional congressional interests—and not any nontraditional interests relating to regulating the political role of the President—were the interests that clearly motivated the passage of FACA.

In short, there is no indication—much less the kind of clear statement required by this Court's decisions, *supra* at 9-11—that Congress intended FACA to regulate presidential consultations with private constituent groups regarding matters as to which the President is subject to constraints only of a political nature.

II. THE CONSTITUTIONAL CONCERNS

1. As we have just seen, Congress had two specific and limited objectives in enacting FACA: preventing wasteful expenditures of treasury funds for the establishment or maintenance of advisory committees; and preventing interested private parties from using such

committees improperly to influence the enforcement of congressionally enacted regulatory schemes. These congressional objectives are well within the range of valid and traditional legislative goals under our constitutional system.

Congress' power to control the expenditure of money from the Treasury by the executive branch cannot be doubted. Article I, § 9, cl. 7, of the Constitution, in unequivocal terms, confers *exclusively* upon Congress the power to appropriate federal funds: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." By constitutional design, the President—and the executive as a whole—are without power to spend any federal monies except upon the advance authorization of Congress. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not . . . previously sanctioned [by Congress]." *Reeside v. Walker*, 52 U.S. 272, 291 (1850). *See also Knote v. United States*, 95 U.S. 149, 154 (1877); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); The Federalist No. 58 (J. Madison) (C. Rossiter, ed., 1961) at 359. Such congressional action can not be impeached on any claim of interfering with constitutionally protected presidential prerogatives.

Similarly, Congress acts well within its constitutional role when the Legislature takes action designed to assure that a legislatively enacted regulatory scheme is enforced in a manner insulated from political influences. *See, e.g., Morrison v. Olson*, —— U.S. ——, 108 S.Ct. 2597, 2619 (1988); *Weiner v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Kendall v. United States*, 37 U.S. 524, 610-612 (1838). Article I, § 8, cl. 18 clearly grants Congress the power to enact laws protecting the integrity of the administration of its legislation against distortion by such influences. That provision states that Congress has the power:

> To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

And, again, such legislation poses no interference with any constitutional prerogative of the President. The President's function with respect to enactments of Congress is to "take Care that the Laws be faithfully executed." Article II, § 3. The President's task is thus to execute the will of Congress as expressed in each validly adopted statute. The precise nature of the Executive's task in this regard is generally defined and limited by Congress in the terms of the enactment; the degree of executive branch discretion in enforcing or implementing a particular statutory scheme is, therefore, only that which Congress provides. Accordingly, if Congress determines by a proper enactment that advisory bodies that are consulted by government regulatory agencies should be subject to government control and supervision to ensure against the subversion of the law enforcement process, the task of the President is faithfully to execute that congressional determination.

2. Appellants, however, would have it that FACA applies in situations that involve neither of the issues on which Congress focused in enacting the statute: *viz.* that FACA goes beyond situations involving the expenditure of government funds and situations involving the integrity of the enforcement of statutory schemes. According to appellants, FACA applies as well to situations, represented by the case before the Court, where the President desires, on a selective basis, to consult certain groups of constituents in connection with decisions of a discretionary and a political nature. It is at this juncture that a serious constitutional question arises.

The President, as we have stressed, is expected to carry out the will of Congress as expressed in duly enacted legislation, whether or not the President agrees

with either the statutory objectives or the means of enforcement prescribed by the Legislature. And the President is not free, at least with regard to purely domestic issues, to implement significant programs that Congress has not authorized.

In these respects, the President serves very much as the agent of Congress. But that is not the whole of the office.

The President and Congress each have an independent and equal political status. In this regard the President serves as a counterweight and check on the power of Congress. As one commentator has put it, " 'The beginning of wisdom about the American Presidency is to see that it contains both principles [that is, administrative responsibility subordinate to the legislature and political equality with it] and to reflect on their complex and subtle relation." Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 600 (1984) (the bracketed material was inserted by Prof. Strauss in quoting Storing, Introduction to C. Thach, The Creation of the Presidency 1775-1789, at vii (1923)).

Justice Story, in his Commentaries on the Constitution, put the duality in the President's roles in the following terms:

> In the exercise of his political powers [the President] is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive. But he has no authority to control other officers of the government, in relation to the duties imposed upon them by law, in cases not touching his political powers. [J. Story, *Commentaries on the Constitution of the United States*, 579 (Rotunda & Novak ed. 1987).][20]

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[20] Chief Justice Marshall had reflected on this point in his opinion for the Court in *Marbury v. Madison*, 5 U.S. 137, *supra*, at 165-166:

3. The political role of the President thus described is at the heart of the Framers' plan for a government that has sufficient authority to carry out the Nation's business yet is sufficiently constrained to assure against the concentrations of power that might endanger individual liberty. That plan depends on the division of *political* power between the executive and the legislative branches so that the government would have the power to act, while at the same time each branch would have the power to guard against the excesses of the other.

The Framers' affirmative reliance on political competition between the executive and legislative branches is best expressed by Madison, in the Federalist No. 51:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
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> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exists, no power to control that discretion. The subjects are political . . . .
>
> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

And the Chief Justice drew the following "conclusion from this reasoning":

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

> To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.
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> But the great security against a gradual concentration of the several powers in the same departments consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition . . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [The Federalist No. 51 (C. Rossiter ed., 1961) at 320-322.]

Madison termed this approach, the "policy of supplying, by opposite and rival interests, the defect of better motives." *Id.*

The strength of this lynchpin of our Constitution depends on the recognition and maintenance of the distinct political powers of the President and the Congress. The Framers conceived of both as representatives of the people.[21] The political power of each branch ultimately rests

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[21] *See* 2 Elliot's Debates 253 (1859 ed.) (Hamilton in New York ratification convention) ("The President will be himself the representative of the people. From the competition that ever subsists between the branches of government, the President will be induced

on the support that branch has among the citizenry. The ability of either branch to act, to persuade the other branch to act, or to check the other branch, is to a large degree dependent upon that branch's ability to accurately reflect, or in turn to marshal, the popular will.

Thus, for example, the President assuredly has the power to veto legislation passed by Congress, but the popular will may constrain his exercise of that power, or provide a basis for a congressional override of a veto. Similarly, the President's power to propose legislation, and Congress' power, in the abstract, to enact legislation, are without practical effect if there is no popular support for an initiative. And—as recent events so forcibly remind —the President's appointment power may be checked, or at least influenced, by Congress' power not to confirm, depending on the relative political strength of the two branches.

The Constitution dictates no particular result in these contests of political strength; the process assumes that the result at any time will be a product of the political realities of that time. But the Constitution does require that neither branch be stripped of its ability to function as an independent political actor—and, indeed, as a competitor—in this process.

4. An essential component of political representation is the ability of a politician to consult with constituents with respect to matters to be determined in the political process. In the words of James Wilson, one of the primary framers of Article II of the Constitution: [22]

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to protect [the people's] rights, whenever they are invaded by either [legislative] branch."); 3 Elliot's Debates 240 (1836 ed.) (Nicholas in Virginia ratification convention) ("[The President] is elected by the people at large .... If he deviates from his duty, he is responsible to his constituents."); *see generally* C. Thach, *The Creation of the Presidency: 1775-1789*, at 166-168 (1969 ed.).

[22] C. Thach, *The Creation of the Presidency: 1775-1789*, at 176 (1969 ed.) ("to James Wilson belongs the credit of crystalizing the concept [of the Presidency] and laying it before the Convention").

> Representation is the chain of communication between the people and those, to whom they have committed the important charge of exercising the delegated powers necessary for the administration of publick affairs. This chain may consist of one link, or of more links than one; but it should always be sufficiently strong and discernible. [1 J. Wilson, Works 430 (1804).]

The defect, from a constitutional perspective, in appellants' broad interpretation of FACA is that the Act so construed threatens to break, or at least to interfere with, the "chain of communication" between the President and his constituents on matters political in nature. Petitioners state that the President may not consult with the ABA Committee on prospective judicial nominees, unless the Committee is willing to submit to an onerous degree of government intrusion in, and supervision over, the Committee's internal processes. *See supra*, at 8-9. Private groups—worthy of that name—confronting the choice of submitting to these government intrusions or declining to consult with the President are likely to choose the latter course.

5. Whether Congress may enact legislation that burdens the President's ability to consult with constituents in this manner is thus a serious constitutional question. In the absence of any evidence that Congress intended FACA to have this effect, this Court should not reach that question.

This Court has repeatedly held that it will "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, —— U.S. ——, 108 S.Ct. 1392, 1397 (1988). Moreover, as a matter of judicial prudence, "constitutional issues [will] not be needlessly confronted" by this Court. *Id.* Based on these two concerns it is a "cardinal principle" that "the Court will construe [a]

statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id. See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929). And it follows necessarily that, where no "plain[] intent" to do so is shown, Congress should not be found to have ventured into an area of serious constitutional concern.

The sum of the matter is this. The Court should construe FACA in a manner congruent with the clear objectives stated by Congress: the scope of the Act should not be extended beyond those situations that involve the use of congressionally appropriated funds or the enforcement of congressionally enacted programs. FACA should not be construed to limit the President, in the exercise of his independent, political functions, from consulting with organizations of his constituents.

CONCLUSION

For the foregoing reasons, the judgment of the district court in this case should be affirmed.

Respectfully submitted,

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